Rollins Container Corp. *and* United Food and Commercial Workers Local 1, AFL–CIO. Case 3–CA–24527

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA ND MEMBERS WALSH AND MEISBURG

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the amended complaint. Upon a charge and an amended charge filed by United Food and Commercial Workers Local 1, AFL–CIO, on October 27 and December 19, 2003, respectively, the General Counsel issued the amended complaint on February 25, 2004, against Rollins Container Corp., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On March 23, 2004, the General Counsel filed a Motion for Default Judgment with the Board. On March 30, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended complaint affirmatively stated that unless an answer was filed by March 10, 2004, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated March 11, 2004, notified the Respondent that unless an answer was received by March 18, 2004, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Rochester, New York, has been engaged in the business of producing corrugated cardboard containers.

During the 12-month period ending September 12, 2003, the Respondent, in conducting its business operations described above, sold and shipped from its Rochester, New York facility goods and materials valued in excess of $50,000 directly to points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that United Food and Commercial Workers Local 1, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

John Burwell	President
Donna Burwell	Controller

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular production manufacturing and maintenance employees of corrugated containers and corrugated components, employed by Respondent at its 100 Nassau Street, Rochester, New York facility, excluding professional employees, office clerical, guards and supervisors as defined in the Act.

Since about May 26, 1978, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from October 1, 1999 to September 30, 2003.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On about July 15, 2003, the Respondent failed to remit contractually-required payments for the month of June

2003, to the Union's healthcare and pension benefit funds on behalf of unit employees.

On about August 15, 2003, the Respondent failed to remit contractually-required payments for the month of July 2003, to the Union's healthcare and pension benefit funds on behalf of unit employees.

On about September 15, 2003, the Respondent failed to remit contractually-required payments for the month of August 2003, to the Union's healthcare and pension benefit funds on behalf of unit employees.

On about October 15, 2003, the Respondent failed to remit contractually-required payments for the month of September 2003, to the Union's healthcare and pension benefit funds on behalf of unit employees.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

On about September 12, 2003, the Respondent ceased its business operations described above, without giving prior notice to the Union.

On about September 26, 2003, the Union, by written correspondence, demanded bargaining with the Respondent regarding the effects of its decision to cease operations on September 12, 2003.

Since about September 26, 2003, the Respondent has failed to give the Union notice and an opportunity to bargain over the effects of its decision to cease operations on September 12, 2003.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

CONCLUSION OF LAW

By the conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that that Respondent violated Section 8(a)(5) and (1) by unilaterally failing to remit contractually-required payments to the Union's healthcare and pension benefit funds on behalf of unit employees since July 15, 2003, we shall order the Respondent to make all required benefit fund payments that have not been made since July 15, 2003, including any additional amounts applicable to such payments as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).[1] We shall also order the Respondent to reimburse the unit employees for any expenses ensuing from its failure to make the required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to cease doing business at its Rochester, New York facility, we shall order the Respondent to bargain, on request, with the Union about the effects of that decision. Because of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed to make whole the unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[2]

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[1] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[2] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). The complaint and motion do not specify the actual impact on the unit employees, if any, of the Respondent's decision to cease doing business at its Rochester, New York facility. Therefore, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See, e.g., *A & B Hydraulic Co*., 341 NLRB No. 69 (2004); *Buffalo Weaving & Belting*, 340 NLRB No. 80, fn. 3 (2003); and *ACS Acquisition Corp.*, 339 NLRB No. 86, fn. 2 (2003).

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased doing business at the facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, because the Respondent is no longer doing business at the Rochester, New York facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of all unit employees employed by the Respondent at any time since July 15, 2003, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Rollins Container Corp., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with United Food and Commercial Workers Local 1, AFL–CIO, by unilaterally failing to remit contractually-required payments to the Union's healthcare and pension benefit funds on behalf of unit employees. The appropriate unit consists of:

> All regular production manufacturing and maintenance employees of corrugated containers and corrugated components, employed by Respondent at its 100 Nassau Street, Rochester, New York facility, excluding professional employees, office clerical, guards and supervisors as defined in the Act.

(b) Closing its business operations at its Rochester, New York facility without providing the Union prior notice and an opportunity to bargain over the effects of the closing on unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required healthcare and pension benefit fund payments that have not been made since July 15, 2003, and reimburse unit employees for any expenses resulting from its unlawful failure to make the required payments, with interest, as set forth in the remedy section of this decision.

(b) On request, bargain with the Union concerning the effects on the unit employees of Respondent's decision to cease doing business at its Rochester, New York facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(c) Pay to unit employees their normal wages for the period set forth in the remedy section of this Decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[3] to the Union and all unit employees employed by the Respondent at any time since July 15, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2004

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

Robert J. Battista, Chairman

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with United Food and Commercial Workers Local 1, AFL–CIO, by unilaterally failing to remit contractually-required payments to the Union's healthcare and pension benefit funds on behalf of unit employees. The appropriate unit consists of:

> All regular production manufacturing and maintenance employees of corrugated containers and corrugated components, employed by us at our 100 Nassau Street, Rochester, New York facility, excluding professional employees, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT close our business operations at our Rochester, New York facility without providing the Union prior notice and an opportunity to bargain over the effects of the closing on unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all required healthcare and pension benefit fund payments that have not been made since July 15, 2003, and reimburse unit employees for any expenses resulting from our unlawful failure to make the required payments, with interest.

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of our decision to cease doing business at our Rochester, New York facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay to unit employees limited backpay in connection with our failure to bargain over the effects of our decision to cease operations at our Rochester, New York facility, as required by the Decision and Order of the National Labor Relations Board.

ROLLINS CONTAINER CORP.